IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

THOMAS LOGAN
Plaintiff

V. NO. 3:96CV103-B-A

PENNACO HOSIERY, an Operating Division of Danskin, Inc., and DANSKIN, INC., Individually
Defendants

MEMORANDUM OPINION

This cause comes before the court upon cross motions for summary judgment, as well as the plaintiff's motion to strike. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

FACTS

The plaintiff was employed in the maintenance department of the defendant, Pennaco Hosiery, with a job title of Maintenance Service-Boiler. He was injured on the job on September 4, 1994, and subsequently terminated by the defendant on September 12, 1995, after his available medical leave had been exhausted. At the time of his termination, the plaintiff's treating physician, Dr. Ernest Lowe, had assigned a lifting restriction of 25 pounds, as well as restrictions on such activities as walking, standing, climbing, stooping, kneeling, and crawling. The plaintiff's injury prevents him from performing heavy labor, though he asserts that he could,

with reasonable accommodation, perform the duties of the position of Maintenance Service-Boiler.

Shortly after his termination, the plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), asserting disability discrimination in violation of the Americans with Disabilities Act (ADA). The plaintiff received notice of the right to sue, and subsequently filed suit for disability discrimination in violation of both Title VII of the Civil Rights Act of 1964 and the ADA, age discrimination in violation of the Age Discrimination in Employment Act, and for violations of both the state and federal Constitutions. This court previously entered an order dismissing the plaintiff's age discrimination and constitutional claims.

LAW

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing'...that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by...affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'"

Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986).

A. Plaintiff's Motion for Summary Judgment

The plaintiff has moved for summary judgment on the issue of liability. The plaintiff asserts that the defendant failed to timely respond to his request for admissions, and therefore the matters therein should be deemed admitted. The plaintiff claims that said "admissions" establish the liability of the defendant.

Local Rule 6(e)(7) states that requests for admissions and responses thereto shall be filed with the clerk of court. The plaintiff asserts that the defendant failed to timely file its

response to the plaintiff's request for admissions.[1] However, the plaintiff has similarly failed to file his request for admissions with the clerk of court.[2] If the plaintiff is to hold the defendant to the letter of the rule, then he, too, must be held to strict compliance. Therefore, the court finds that the matters contained within the plaintiff's request for admissions should not be deemed admitted, and the plaintiff's motion for summary judgment denied.[3]

B. Defendants' Motion for Summary Judgment

To assert a claim under the ADA, the plaintiff must offer proof that (1) he has a disability; (2) he is a qualified individual; and (3) he suffered an adverse employment decision because of his disability. Turco v. Hoechst Celanese Corp., 101 F.3d 1090, 1092 (5th Cir. 1996). The defendants maintain that the

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[1] The plaintiff further asserts that the defendant failed to timely serve its response upon the plaintiff. The court finds from the evidence presented that the defendant did timely serve its response upon the plaintiff.

[2] The court docket shows that both the request for admissions and the response thereto were filed on January 29, 1997. The plaintiff's motion for summary judgment is based on the premise that his request for admissions was served on December 3, 1996, and that the defendants failed to respond within the thirty-day deadline. With both documents docketed on the same date, the defendants obviously filed their response in a timely manner.

[3] Even if the plaintiff's requests were deemed admitted, the statements contained therein do not establish a prima facie case that the plaintiff is a qualified individual with a disability (i.e., that he could perform the essential functions of the position with or without reasonable accommodation).

plaintiff is not a qualified individual. To prove that he is a qualified individual, the plaintiff must establish that he can perform the essential functions of his position with or without reasonable accommodation. 42 U.S.C.A. § 12111(8) (1995); Turco, 101 F.3d at 1092. The determination as to whether a person is a qualified individual must be made as of the time of the employment decision. Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 563 (7th Cir. 1996).

The plaintiff attempts to create a genuine issue as to what constitutes the essential functions of his position. However, in responding to one of the defendant's interrogatories, the plaintiff admitted that the essential functions of his job were set out in the defendant Pennaco's written job description. Item numbers 1 and 11 on the written job description state:

> 1. Check and assure that all well water used is within the tolerances of the prescribed test levels. The tests are to include samples from the boiler, salt softener, acid softener, water chillers and condensate returns.
>
> 11. Add chemicals to all water systems as required.

The details as to the physical requirements necessary to perform the essential functions of the plaintiff's job are found within the undisputed evidence. Performing the two essential functions listed above requires that the plaintiff move 200lb. barrels of sulfuric acid from a storage location to the water and steam systems, carry 50lb. bags of salt from a storage location to the water system and pour the salt into the system, and tilt 700lb. barrels of oil to be

drained into one gallon containers. Such lifting requirements greatly exceed the 25lb. lifting restriction placed upon the plaintiff by his treating physician.

The plaintiff asserts that the defendant could make reasonable accommodations which would allow him to perform the lifting required by the position. Such accommodations include buying smaller bags of salt and purchasing a hand pump with which to pump oil out of the barrels from an upright position. However, even if the employer could make reasonable accommodations that would allow the plaintiff to avoid the heavy lifting required by the position, the plaintiff still could not perform the other physical requirements of the job.

The motion analysis summary of Susan Alexander indicates that over a four week period of time, the Maintenance Service-Boiler spends approximately 98% of his time on his feet. Furthermore, the motion analysis summary makes numerous references to bending and climbing (in addition to lifting and continuous walking) as physical requirements of each of the plaintiff's duties. At the time of his termination, the plaintiff was restricted from entering into such physical exertion. The medical report from Dr. Lowe dated May 20, 1996, placed significant restrictions upon the plaintiff's physical activity, including no more than four hours of standing and/or walking in an eight hour day and for no longer than thirty minutes without interruption. The plaintiff was further

restricted from kneeling and crawling, and was cautioned to do no more than occasional climbing, balancing, stooping and/or crouching. Another medical report from Dr. Lowe dated June 19, 1995, noted that the plaintiff had reached maximum medical recovery and would have a permanent work restriction, which included limited ambulation. There is no evidence that Dr. Lowe (or any other physician) lifted or modified these restrictions at any time prior to the plaintiff's termination.

To perform the plaintiff's job requires the plaintiff to be able to walk for extended periods of time, and further requires frequent bending, stooping, reaching, climbing, and lifting (within or without the 25lb. limitation). The opportunity to sit, or even to stand in one place without physical exertion is severely limited. Although the plaintiff states that he does have some opportunities to sit while performing his job, he does not offer any evidence that he could perform his duties while sitting for four hours out of an eight hour day, as consistent with the restrictions placed upon him by his treating physician.[4] The plaintiff has offered no evidence that he could perform the duties of his position without substantially violating the physical

[4] When asked in his deposition about opportunities to sit during his eight hour work day, the plaintiff mentions only two possible hours of intermittent sitting.

restrictions placed upon him as a result of his injury.[5] He has never stated that his job required no more than occasional climbing, balancing, stooping and crouching, required no kneeling or crawling, and required no more than four hours a day on his feet. The plaintiff has merely stated that he believes he could do the job if given the chance. Such testimony is insufficient to prove that he could perform the essential functions of the position with or without reasonable accommodation.

The plaintiff further suggests that he could return to work if the defendant either eliminated the lifting requirements of the job or transferred him to another position within the company. However, the ADA does not require an employer to eliminate or reassign the essential functions of a position, nor does it require the employer to transfer the employee to a new job assignment. White v. York Int'l Corp., 45 F.3d 357, 362 (10th Cir. 1995); Guneratne v. St. Mary's Hosp., 943 F. Supp. 771, 774-775 (S.D. Tex. 1996); Vaughan v. Harvard Indus. Inc., 926 F. Supp. 1340, 1348 (W.D. Tenn. 1996).

C. Plaintiff's Motion to Strike

[5] The plaintiff's vocational expert does not even state that the plaintiff could perform the essential functions of the job with reasonable accommodation. The vocational expert focuses his attention on whether or not the defendant has other positions which the plaintiff could have filled. However, the ADA does not require the defendant to transfer the plaintiff to another position. White v. York Intern. Corp., 45 F.3d 357, 362 (10th Cir. 1995); Vaughan v. Harvard Indus. Inc., 926 F. Supp. 1340, 1348 (W.D. Tenn. 1996).

Finally, the plaintiff moves to strike the declaration of Susan Alexander, which contains a motion analysis summary. The motion analysis summary details the amount of physical exertion required of the person performing the Maintenance Service-Boiler position, including the frequency and duration of lifting, walking, bending, climbing, and sitting. The summary was composed after Alexander had followed the Maintenance Service-Boiler for several days, and then interviewed both him and his supervisor. In her affidavit, Alexander stated her position with the defendant, told of how she created the motion analysis summary, and authenticated the attached summary.

To be considered by the court as an exhibit to a motion for summary judgment, an affidavit must: (1) be sworn upon personal knowledge; (2) state facts admissible at trial; and (3) be offered by a competent affiant. Fed. R. Civ. P. 56(e). The court finds that the declaration of Susan Alexander meets all of the prerequisites, and therefore may be considered by the court in ruling upon the motion for summary judgment. In the motion analysis summary, Alexander is not offering any opinion regarding the position of Maintenance Service-Boiler, but is merely reciting facts that she observed. Thus, the court finds that the plaintiff's motion to strike should be denied.

CONCLUSION

For the foregoing reasons, the court finds that the plaintiff's motions to strike and for summary judgment should be denied, and the defendants' motion for summary judgment should be granted. An order will issue accordingly.

THIS, the _____ day of April, 1997.

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NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE